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No. 09-317

Supreme Court, U.S.
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In The

Supreme Court of the United States

CITY OF PATTERSON, CALIFORNIA,

Petitioner,

v.

BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA
and MORRISON HOMES, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The California Court Of Appeal,
Fifth Appellate District**

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the California Court of Appeal err by holding that California's legal standards generally applicable to development fees and exactions require that an "affordable housing in lieu fee" that is levied by a City upon developers of residential subdivisions as a condition of building permit issuance be reasonably related to the need for affordable housing created by the residential subdivision?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The respondent, Building Industry Association of Central California, is a non-profit corporation, with no publicly issued stock.

The respondent, Morrison Homes, Inc., is now an entity known and doing business as Taylor Morrison of California, LLC, a California limited liability company, and is not itself publicly traded. During the course of this litigation, Morrison Homes Inc. was involved in a merger with Taylor Woodrow Inc., which in turn was acquired by a corporation based in the United Kingdom known as Taylor Wimpey PLC; and Taylor Morrison of California, LLC is now a wholly-owned subsidiary of Taylor Wimpey PLC. Taylor Wimpey PLC is organized under the laws of the United Kingdom and is publicly traded (LSE: TW).

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STATEMENT OF THE CASE

The plaintiffs brought an action in the California state courts for declaratory relief/writ of mandamus, for interpretation and enforcement of a development agreement, under the state laws of California. The case involves a challenge to the City's imposition of "affordable housing in lieu fees" against a residential development project, including the issue upon which the California Court of Appeal decided the case: whether the City's imposition of a "revised" housing fee (at the new rate of $20,946 per home rather than the previous rate of $734 per home) was consistent with the terms of the development agreement.

The California Court of Appeal applied state law in its interpretation of the contractual language, which allowed for the imposition of a "revised" housing fee against the development project, so long as any such revised fee was shown to be "reasonably justified." The Court searched the evidentiary record, found that the new housing fees were not "reasonably justified" as that term is construed under existing California law applicable to development fees, and held that the City's imposition of new housing fees did in fact breach the development agreement. "For this reason, we conclude that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not 'reasonably justified' within the meaning of that provision." (*Building Industry Ass'n v. City of Patterson,* 171 Cal.App.4th 886, 899 (2009).)

Factual Background:

The facts of the case are well stated in the Court of Appeal's opinion (*Building Industry Ass'n et al. v. City of Patterson*, 171 Cal.App.4th 886, 90 Cal.Rptr.3d 63 (2009).) The City's petition does not appear to question the appellate court's summary of the facts.

The case arose out of a comprehensive development agreement between the City of Patterson and land developer, predecessor in interest to the plaintiff Morrison Homes. The development agreement, authorized by California's development agreement statute (Cal. Government Code § 65864), set out the rules, regulations, conditions, and development fees that would be applicable to the plaintiff's approved residential development project during the anticipated long-term build-out of the subdivision.

The case was decided on the basis of the Court of Appeal's interpretation of the contractual language used in the development agreement. The agreement provided, in part, that the development would be obligated to comply with the City's then-existing affordable housing policies. At the time the development agreement was executed in January 2003, those City affordable housing policies called for the developer either making a certain percentage of new homes in the subdivision available to lower income residents at privately-subsidized costs, or, at the developer's election, paying the City a fee "in lieu" of providing subsidizing housing units. The City's fee

was then set at a rate of $734 per new home building permit.

The development agreement also included a clause, however, which recited that the City was supposedly then in the process of updating its affordable housing in lieu fees. The agreement provided that the development agreed to be bound by a revised fee schedule that was anticipated to emerge from the updated analysis, and would pay the revised in lieu fee, at a rate no less than the existing rate of $734 per home – provided that any such revised in lieu fee was "reasonably justified."

The City did not immediately adopt any such revised housing fee. Instead, in November 2005, the City Council adopted an amended schedule of development fees which maintained the "affordable housing in lieu fee" at the existing rate of $734 per house (Council Res. No. 2005-114, JA 1099). Three years after it entered into the development agreement, in March 2006, the City adopted a new approach to establishing its "affordable housing in lieu fees" and adopted a new resolution setting its new "in lieu fees" at the rate of $20,946 per new single family home building permit.

When the City began imposing its new $20,946 fee against the plaintiff's approved project, plaintiff objected, paid the disputed fees under protest (as provided by California law, Government Code §§ 66020, 66021) and filed suit for relief.

Procedural Background:

The Complaint was filed in the Stanislaus County Superior Court in October 2006, and following a bench trial on the documentary record, the trial judge issued a decision in favor of the City in December 2007. Plaintiffs timely appealed to the Court of Appeal, Third Appellate District.

The Court of Appeal issued its unanimous decision on January 30, 2009, reversing the lower court, and holding that the City's imposition of the new $20,946 affordable housing in lieu fee violated the development agreement, because that fee was not "reasonably justified" under California's legal standards generally applicable to legislatively-enacted development fees.

The Court of Appeal subsequently issued an order on March 2, 2009, modifying its opinion in part, but not affecting the result, and certifying the opinion for publication as provided by the California Rules of Court. On March 20, 2009, the Court of Appeal issued its order denying the City's petition for rehearing, and further modifying a portion of the opinion but not changing the holding of the Court.

The California Supreme Court unanimously (with one recusal) denied the City's subsequent petition for review on June 17, 2009, and denied requests for depublication of the Court of Appeal's opinion.

REASONS FOR DENYING THE WRIT

The City's petition for a writ of certiorari should be denied, because it fails to demonstrate any of the grounds indicated by Rule 10.

The petition mis-states the "issue presented" by this case. The Court of Appeal decided this case by interpreting a written agreement – a matter of state law – as calling for the application of the "legal standards generally applied to such [legislatively-enacted development] fees" as previously described by the California Supreme Court. The Court concluded that the City's new fees were not "reasonably justified" under California law, because they failed to satisfy the legal standards for such fees. The Court accurately explained that those standards "require that the amount of a development fee be limited to the cost of that portion of a public program attributable to the development" (citing *San Remo Hotel v. City & County of San Francisco,* 27 Cal.4th 643, 671, 117 Cal.Rptr.2d 269, 41 P.3d 87 (2002).) The Court of Appeal searched the record and reported that it could locate "nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project." (171 Cal.App.4th 886, 899.)

The California Supreme Court denied the City's petition for review, and its request for de-publication of the Court of Appeal's decision, implicitly rejecting the City's claim of error in applying existing California law.

Nothing in the Court of Appeal's decision conflicted with the decision of another state court of last jurisdiction or of a United States court of appeal, nor with any decision of this Court (cf. Rule 10(b) and 10(c), erroneously invoked by the City in its petition.).

The new contention in the City's petition that the "reasonable relationship" test in the Court of Appeal opinion is "indistinguishable" from "the 'substantially advances' test which was discredited by the Court in *Lingle v. Chevron*, 544 U.S. 528 (2005)" is without merit.

This Court's opinion in *Lingle v. Chevron, supra,* did not "discredit" the "substantially advances" test, but rather clarified that such a test is not a relevant inquiry in a regulatory takings challenge, but rather is more suited to a due process challenge to a regulation. This case was not decided on the basis of either, but rather on the basis of contractual interpretation, and application of the legal standards generally applicable to development exactions.

This Court's opinion in *Lingle v. Chevron, supra*, explicitly emphasized that it was not intended to disturb, much less "discredit," the Court's prior decisions on the standards applicable to such development exactions (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).) California has generally applied the Court's "reasonable relationship" standards for development exactions to monetary fees imposed as conditions of development approval, such as the City's in lieu fees, although purporting to distinguish

between "legislatively enacted" exactions or fees of broad application and quasi-adjudicatory or ad hoc project specific exactions as to the level of judicial scrutiny to be applied to such fees or exactions. (See, e.g., *Ehrlich v. City of Culver City,* 12 Cal.4th 854 (1996); *San Remo Hotel, supra*, 27 Cal.4th at 665-672; see also, the California Mitigation Fee Act, Government Code sections 66000 *et seq.*).

Moreover, the City's petition cites no authority, and provides no argument, to try to support its new contention that the "reasonable relationship" legal standard applied under California law to development fees and exactions as in this case is in fact "indistinguishable" from the "substantially advances" test as it may have been previously used in the context of "regulatory takings" claims. To the contrary, the Court expressly explained that the rule those decisions (*Nollan* and *Dolan*) established for development exactions "is entirely distinct from" the "substantially advances" test that the Court was expounding in *Lingle*. (*Lingle, supra*, 544 U.S. at 547.)

The writ should also be denied because the City failed to previously raise the "issue" it now seeks to present to this Court. The Court of Appeal pointed out that the City had *not* argued on appeal for the application of any "different test" or legal standard in determining whether the City's $20,946 in lieu fees were reasonably justified (171 Cal.App.4th 886, at 899.) "Despite the lack of an argument from City addressed to the reasonable relationship test, we have examined the [record] to determine whether the

test is satisfied by the information provided." As previously stated, the Court of Appeal could find "nothing" in the evidentiary record even implying that the City had met this requirement.

CONCLUSION

The case presents nothing more than the interpretation and application of state law. No federal question was ever presented to the California courts.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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